No. 200,748-1

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN THE MATTER OF THE
DISCIPLINARY PROCEEDINGS AGAINST

J. DAVID SMITH

An Attorney at Law

Bar Number 8993

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# OPENING BRIEF OF RESPONDENT SMITH

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This is Respondent J. David Smith's Opening Brief in Opposition to the Disciplinary Board's Decision in this matter. For convenience, and out of no disrespect, last names are used for the various persons involved. Pursuant to ELC 11.5(b), the hearing transcript is referred to as "TR," the exhibits as "EX" and the bar file or clerk's papers as "BF."

Smith pled guilty to a single count in a 20 count federal crime indictment. Based on the conviction which followed his guilty plea the Washington State Bar Association (WSBA) charged Smith with ethical violations and by use of various procedural rules obtained a determination that Smith had committed ethical violations which merited his disbarment. At no time in the Bar proceedings has Smith been given the opportunity to explain his version of what happened, to explain why he pled guilty or to offer evidence as to his innocence. This appeal challenges the constitutionality of the key procedural rule used by the WSBA to find the ethical violation and to obtain the disbarment recommendation. That key rule is not constitutional and therefore cannot be used. Without the use of that rule, the WSBA failed to prove its case against Smith and the case must be dismissed.

## ASSIGNMENTS OF ERROR

1. The Board erred when it used ELC 10.14(c) (conclusive presumption of violation of statue if there is a criminal conviction) under the facts of this case to determine that Smith had committed ethical violations.
2. The Board erred when it adopted most portions of the hearing officer's FFCLR as its own.
3. The Board erred when it adopted the hearing officer's findings regarding aggravators and mitigators and failed to adopt relevant additional mitigators.
4. The Board erred when it adopted the hearing officer's recommendation of disbarment.

## ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Board commit error when it used ELC 10.14(c) (conclusive presumption of violation of statue if there is a criminal conviction) under the facts of this case to determine that Smith had committed ethical violations? Assignment 1.
2. Did the Board commit error when it adopted most portions of the hearing officer's FFCLR as its own? Assignment 2.

3. Did the Board commit error when it adopted the hearing officer's findings regarding aggravators and mitigators and failed to adopt relevant additional mitigators? Assignment 3.
4. Did the Board commit error when it adopted the hearing officer's recommendation of disbarment? Assignment 4.

## STATEMENT OF CASE

### Factual and Procedural History

The factual and procedural histories of this matter are closely intertwined on the issues presented for review so they are summarized together.

The underlying allegation in this matter stems from Smith's involvement with a developer named Terry Martin. The United States Attorney accused Martin, Smith and others of a conspiracy to defraud. *United States v. Martin, Smith, White, Tezak,* Cause No. CR03-0370RSL (W.D. Wash.). There was an initial indictment (not part of this record). On February 12, 2004, a Superseding Indictment was filed. EX A 103. That indictment is the one relevant to these proceedings.

The Superseding Indictment alleges that Martin was seeking to develop a 40-acre office park called, Silver Sound Corporate Center (SSCC). Under the plan Martin would own about 25 acres and a sewer

district would own the remaining 15 acres. The sewer district, Holmes Harbor Sewer District (HHSD), was to issue $6.2 million in bonds as part of the arrangement. Smith was alleged, starting in 1998, to have engaged in a conspiracy with Martin and others to defraud and mislead the sewer district and others as to the real property the district would be buying; the means by which Martin would obtain title to some of the real property for his portion of development; the value of the property being obtained by the sewer district; the status of permits for the property; the status of pre-leases on the office space; the status, provider and use of construction loans for the development; and the intended use of the funds raised by the sale of the bonds

The Superseding Indictment alleged in Count 1 that Smith had engaged in a conspiracy in violation of 18 USC § 371 - Conspiracy to Commit Offenses Against the United States. The unlawful actions were alleged to be in violation of 15 USC §§ 78(j)(b) and 78ff(a); 18 USC § 1343 and 17 CFR § 240, 10b-5. These are essentially use of interstate commerce, the mails and wire communications to defraud. In short parlance, Smith was accused of conspiracy to commit fraud by use of the mail and other interstate communications, however, he was only convicted of the conspiracy allegation, not the alleged "unlawful" actions. Smith was

also charged in Counts 2 – 10 of securities fraud and in Counts 11 – 20 of wire fraud. Counts 2 – 20 were dismissed.

Smith pled guilty to Count 1 on April 28, 2004. EX A 102. His license to practice law was suspended under the interim suspension rules which apply when there has been a felony conviction. He has remained suspended.

The Bar filed a Formal Complaint on June 4, 2004. BF 1. It asserted that Smith had pled guilty to the violation of 18 USC § 371, that the conspiracy was under 15 USC §§ 78(j)(b) and 78ff(a); 18 USC § 1343 and 17 CFR § 240, 10b-5; and that under ELC 10.14(c) his conviction was conclusive evidence of his guilty of the crime and violation of the statute on which the conviction was based. The Bar then set forth 74 additional paragraphs using sentences from the plea agreement as facts of the case. It charged him with one count of misconduct with multiple violations:

> By committing the acts that resulted in the conviction for Conspiracy as set forth above, Respondent violated RPC 1.2(d), 4.1(a), 4.1(b) and/or 8/.4(c) and/or former RLD 1.1)(a) (currently RPC 8.4(i))

On advice of counsel, Smith filed a short answer on June 29, 2004, asserting his Fifth Amendment privilege against self-incrimination while stating that he was doing so only because he needed to preserve those rights until after his sentencing and that thereafter he intended to file a full

answer to the Formal Complaint. BF 12. Smith was sentenced to jail and the case went on hiatus while he was incarcerated but any protection the public may have needed was in place since he had already been suspended under the interim suspension rule.

Three different hearing officers were appointed with the final one being Donald Carter appointed on February 14, 2008, BF 21, and the case moved back into active mode. At that point Smith was not in prison but was under federal probation supervision in New York so he sought to have the matter stayed until such time as he was free to travel to Washington State for the hearing. BF 26. This motion was denied and on March 19, 2008, Hearing Officer Carter ordered Smith to file a complete answer within 10-days. BF 28.

Smith filed his "Answer to WSBA's Formal Complaint; Affirmative Defenses/Mitigating Circumstances" on March 24, 2008. BF 29. In his Answer, at ¶ 2, Smith admitted the allegation that he had entered a guilty plea but challenged the constitutionality of the USC provisions under which he had been convicted and asserted, therefore, that the conviction was void *ab initio*. He then addressed the remaining paragraphs of the complaint denying that he had conspired to violate the USCs or CFRs cited and specifically challenging the constitutionality of ELC 10.14(c) which

provided that his conviction was conclusive evidence of his guilty of the crime and violation of the statute. He then turned to the specific factual allegations the WSBA had made in paragraph's 6 – 80 of the Formal Complaint based on the plea bargain. He admitted some of the factual asserts but denied and/or offered additional facts to many of them. A fair summary of his admissions and denials is that he denied doing anything wrong except knowing at closing that an equity participation agreement was not true while believing that there were sufficient funds to cover that matter. He asserted he was lied to by Martin and others. He defended in part on the basis that he had been a whistle blower on the entire scheme created by Martin.

Importantly, he specifically recanted the admissions in the plea agreement asserting they had been coerced. He asserted various affirmative defenses and mitigators including challenging the constitutionality of 18 USC; challenging the constitutionally of ELC 10.14(c) which purports to establish a conclusive presumption that a guilty determination no matter how obtained provides sufficient due process in an attorney-disciplinary proceeding; asserted that his plea bargain was an adhesion contract presented to him on a "take-it-or-leave" basis and that Judge Lasknik (the sentencing judge in the federal criminal matter) had said:

> I think that, you know Mr. Smith by all – what everyone says is a kind and decent and ethical man. And it's, you know, that is the kind of person that makes people like Terry Martin succeed in their efforts because he can get behind the kind, ethical and decentness of a lawyer who people kind of trust and have good association with. And as I say, it seems to me, Mr. Martin being the consummate con man saw something in Mr. Smith that he could utilize and parlay.
>
> And Mr. Smith when exactly he realized that he was being used that way and what he did about it, I think he's beaten himself up over that more than I or anyone else can. It was not consistent with his life beforehand. It was not consistent with the standards he has set for himself. And his chagrin over this is I feel sincere and very deeply felt.

The WSBA filed a motion for an Order Finding Misconduct Based on the Pleadings (ELC 10.10(b)). BF 35. ELC 10.10(b) provides:

> Prehearing Dispositive Motions
>
> (b) Disciplinary counsel may move for an order finding misconduct based on the pleadings. In ruling on this motion, the hearing officer or panel may find that all or some of the misconduct as alleged in the formal complaint is established, but will determine the sanction after a hearing.

The Association asserted that since Smith had admitted that he had pled guilty to Count 1 of the Superseding Indictment, ELC 10.14(c) applied.

> ELC 10.14 - Evidence and Burden of Proof
>
> (c) If a formal complaint charges a respondent lawyer with an act of misconduct for which the respondent has been convicted in a criminal proceeding, the court record of the conviction is conclusive evidence at the disciplinary hearing

> of the respondent's guilt of the crime and violation of the statute on which the conviction was based

The Bar argued that Smith's guilt of the crime was conclusively proven. Then, relying upon *In re Plumb*, 126 Wn.2d 334, 338-39, 892 P.2d 739 (1995), for the contention that a lawyer may not challenge the facts necessary to the criminal conviction, they asserted that all the facts contained in the plea agreement where facts necessary to the criminal conviction and therefore had been proved even though Smith had substantially denied them in his Answer.

The heart of the Bar's position, later rejected by the Disciplinary Board, was the Bar's bootstrapping from the plea agreement by saying that since Smith had admitted the facts in the plea agreement and since he admitted in his Answer that he had signed the plea agreement, he had admitted for purposes of the ELC 10.10(b) motion the facts in the plea agreement. From this they argued that these facts show that Smith counseled his client to engage in criminal behavior, made false statements, failed to disclose material facts to prevent a criminal act, committed a criminal act and showed a lack of moral turpitude. This approach was rejected by the Disciplinary Board on its review.

Hearing Officer Carter sent a letter on April 4, 2008, advising that he had received the Bar's motion for the order finding misconduct based on

the pleadings. He advised that Smith could respond if he wished but Hearing Office Carter pre-ruled that he would not hear any arguments about whether the plea was voluntary, whether any statement on plea of guilty was voluntary and whether USC Title 18 was constitutional. He limited Smith's response to 11 pages. BF 40.

Smith responded on April 16, 2008. BF 49. In so many words he raised the bootstrapping argument at page 3 and then at page 4 argued that he was being denied due process by the conclusive presumption of guilt when a lawyer was found guilty based on a plea bargain.

The Bar's response was filed April 21, 2008. BF 51. The Bar argued in essence that the use of ELC 10.10(b) to determine finality of guilt and proof of the facts set forth in a plea agreement was not a denial of due process. On the same day the Bar filed its response, April 21, 2008, the hearing officer entered the Bar's proposed order and found that Smith had committed all the misconduct alleged in the Formal Complaint and set the matter for hearing on the issue of sanctions only. BF 56. As later confirmed by the Disciplinary Board, such broad findings of misconduct cannot be made on the basis of the Formal Complaint and Answer, the only relevant proof for the ELC 10.10(b) motion.

Smith had counsel when the initial "5th Amendment" Answer had been filed in 2004 but from the time the case started up again in 2008 through the entry of the order providing for a sanctions only hearing, he was pro se. Below signing counsel appeared June 2008. BF 71.

A hearing was held December 10, 2008. Smith, through his counsel, argued for review of the scope of the April 21, 2008, order restricting the hearing to the issue of sanctions only as well as on issues of constitutionality. TR 4 – 18. The hearing officer refused to hear arguments on the constitutionally saying "I don't think I do have the power to rule on constitutionality." TR 18, line 8. On the issue of his April 21, 2008, order he stated that he considered the WSBA's motion to have been in the nature of a summary judgment motion or a CR 12(b)(6) motion or a CR 56 motion and that he was standing by his ruling that the hearing could only address the issue of sanctions. TR 20 -21.

The Bar had moved for a Motion in Limine at page 10 of its Hearing Brief. BF 84. It asked for the exclusion of any argument that "the respondent is not guilty of [the] crime of Conspiracy, or that he did not commit the crime of Conspiracy" and that no testimony be allowed that was inconsistent with essential elements of the crime …."

Ruling in general on the issues which had been raised about the scope of testimony as well as by the motion in limine the hearing officer determined that his order was intended to be a specific finding of violations of all the alleged RPCs and RLD. TR 22. He said that "with regard to the facts that go beyond the criminal convictions, I'm not going to hear those." TR 23.

The Association moved for admission of various exhibits including a report and recommendation concerning plea, the plea agreement, the superseding indictment, the superseding plea agreement, transcripts from four proceedings and the judgment in the criminal case. EXs 101 to 108; 110, 111. TR 23 – 24. Objection was made based on relevance and hearsay since they purported to prove what had already been established by the hearing officer's April 21, 2008, order. TR 24 – 27. They were all admitted. TR 30 – 33.

There was then a substantial discussion between both counsel and the hearing officer regarding the nature of a plea agreement and Smith's intent during the sanction portion of the hearing to repudiate it. TR 33 - 37. This concluded with the hearing office making the statement at TR 37:

> I am not going to go behind the plea agreement. I'm not going to find your client was coerced. I'm not going to in any way offer some validation that he wasn't criminally liable for what he did or that his violation didn't occur. I

> can't do that. That's not my job here. There's a valid plea agreement it's cited throughout the pleadings. Again, I do have the leeway as far as evidence and I can consider it as to weight, and that's why I am admitting that. So let's proceed.

He was asked about when Smith was on the stand being asked whether he agreed with the plea agreement and the ruling was: "... You cannot say if you agree with the plea agreement and why. .... I am not going to have you talk about coercion or anything else." TR 38.

At this point the hearing officer had ruled that the WSBA had proved all the elements of all the RPCs and RLD charged, that he would not hear any constitutional arguments since they were beyond his "powers", that he would not hear "facts that go beyond the criminal convictions," he would not allow Smith to testify about whether or not he agreed with the plea agreement or why and that he was not going to let Smith talk about "coercion or anything else."

The Association rested as did Smith. TR 39. Closing argument was held and the hearing was concluded.

The hearing officer filed his Findings, Conclusions of Law and Recommendation, FFCLR, on January 14, 2009. BF 90. He found that the purpose of the hearing was to determine an appropriate sanction for Smith's actions. FFCLR ¶ 1.3. He acknowledged his admission of the

various exhibits stating "Those exhibits were admitted for the purpose of determining whether there were aggravating and/or mitigating factors which might affect the imposition of the appropriate sanction." FFCLR ¶1.3.

He then, however, did just the opposite of what he said he was going to do with the exhibits. Instead he relied upon the exhibits which he had admitted solely for the purpose of addressing aggravators and mitigators to show the facts upon which he relied to find misconduct. He then determined the appropriate presumptive sanction was under ABA Standard 5.1 by citing the Superseding Indictment, EX. A 103, for factual assertions as to the "object of the conspiracy," FFCLR pages 14 and 15, information not found in the Formal Complaint.

He found that Smith acted knowingly and that there was injury. FFCLR page 14. He found that disbarment is the presumptive sanction and the aggravators of dishonest and self-motive, pattern of misconduct, substantial experience in the practice of law and refusal to acknowledge wrongful nature of misconduct. FFCLR page 17. He found the mitigator of absence of a prior disciplinary record while rejecting the criminal sentence as an "other penalty and sanction," citing *In re Disciplinary Proceedings Against Perez-Pena*, 161 Wn.2d 820, 835, 168 P.3d 408 (2007) and *In re*

*Disciplinary Proceedings Against Haley*, 156 Wn.2d 324, 126 P.3d 1262 (2006). He recommended disbarment. FFCLR page 18.

The matter came before the Disciplinary Board for automatic review pursuant to ELC 11.2(b). The Disciplinary Board filed an Amended Disciplinary Board Order on October 21, 2009. BF 120. The Board modified the Hearing Officer's Findings of Fact, Conclusions of Law and Recommendation, concluding that the "hearing officer could only consider the complaint and answer." ELC 10.10(d). As such they struck the hearing officer's findings that Mr. Smith had violated RPC 1.2(d) and RPC 4.1(a) and (b) since proof of any such violation could not be found based solely on the Formal Complaint and Answer. The Board concluded that based solely on the complaint and answer the record showed violations of RPC 8.4(b), 8.4(c) and 8.4(i). The Board agreed with the hearing officer that disbarment under ABA Standard 5.11(a) was the appropriate sanction.

Respondent Smith now seeks review by this court pursuant to ELC 12.3(a).

## DISCUSSION

### Challenge to FFCLR

The Disciplinary Board's Order says it is adopting most of the hearing officer's FFCLR. At the same time the Board determined that "the Hearing Officer could only consider the complaint and answer" when making his findings of misconduct. Board Order, page 21, line 45. BF 120. Many of the factual conclusions reached by the hearing officer cannot be made based only on the complaint and answer and certainly not by a clear, preponderance since most of the allegation the Bar makes are denied by Smith. In those circumstances there is no basis upon which to make a factual determination. To the extent the WSBA seeks to respond to the findings of misconduct on this matter by the use of portions of the FFCLR other then those found in the complaint and admitted to in the answer, Smith reserves his right to address such assertions in reply.

To preserve his rights Smith challenges the FFCLR in their entirety but will argue in this brief based on the assumption that the only evidence which could be considered by the Hearing Officer on the issue of whether RPC violations occurred was the Formal Complaint and Mr. Smith's Answer.

**Summary of Smith's Position**

As a result of the Board's determination, this case and the issues raised by Smith on appeal can fairly be summarized as this:

- Smith pled guilty to felony charges and was, therefore, convicted.
- By operation of law under ELC 10.14(c) he is deemed to be guilty of the crime and violation of the statute on which the conviction was based and is not allowed to challenge that conviction.
- By further operation of law under ELC 10.10(b), only the allegations and admissions in the Formal Complaint and Answer can be used to find misconduct.
- Based on the ELC 10.10(b) it was determined that the WSBA proved by a clear preponderance of the evidence that Smith had committed the alleged crime because he admitted in his answer that he had pled guilty to it.
- Because ELC 10.10(b) leads to a finding that he violated a criminal statute, it is concluded as a matter of law that he violated three RPC Title 8 rules relating to commission of a crime, dishonesty and lack of moral turpitude.
- Since he is found to have violated the three RPC sections including the ones relating to criminal conduct involving dishonesty ABA Sanctions Standard 5.11(a) applies and disbarment is the appropriate sanction.

It is undeniable that Smith pled guilty to the felony charge. However, the rest of the findings, the legal conclusions and the recommendation all depend upon the automatic proof provisions of ELC 10.14(c) which deems the crime to have been conclusively proved if Smith pled guilty to it. Smith challenges the constitutionality of ELC 10.14(c) and

because that provision is not constitutional he cannot be found by operation of law to have committed the RPC violations since such findings rely upon the conviction. He also cannot be sanctioned since any sanction relies upon the improperly found RPC violations. Since ELC 10.14(c), as applied in this case, is not constitutional the entire house of cards comes down and the WSBA has not proved it case.

The case against Smith must be dismissed as not having been proved since without the improper findings based on ELC 10.14(c) there is no proof of misconduct by Smith

**Findings of Misconduct**

The Disciplinary Board modified the hearing officer's findings to find that Smith had violated three separate RPCs. They do so without identifying which facts in the Formal Complaint and Answer are to be deemed proven. However, the only crucial fact that Smith admitted was that he was convicted. They seem to have agreed with the hearing officer's generalized statements about "the facts" but continue to use them only broadly without indicating which of the facts prove which elements of the alleged RPC violations. This is a problem which flows from the WSBA never having to identify which facts go with which RPC provisions. The findings of misconduct and the related RPCs based on incomplete findings,

the flawed ELC 10.10(b) process, the flawed ELC 10.14(c) process and the misuse of exhibits does not permit a meaningful review of the decision below and it must be dismissed.

**Constitutionality of ELC 10.14(c)**

ELC 10.14(c) provides that conviction of a crime is conclusive proof of the respondent's guilt of the crime and violation of the statute on which the conviction is based. The rule makes no exception for the circumstances under which the plea bargain is obtained and as applied in this case denied Smith the opportunity to explain what happened and why he pled guilty. Under ELC 10.14(c) a conviction after a fully litigated jury trial is treated the same as a conviction based on a plea bargain. The issue in this case is limited to whether ELC 10.14(c) is constitutional when it is used in the situation of a plea bargain. The issue of whether the rule might be constitutional after a bench or jury trial is not at issue and remains for another day.

The overbroad application of ELC 10.14(c) which occurs in this case by its use in a plea bargain case is unconstitutional as a denial of due process under the due process clause of the Fifth (no state shall deprive any person of life, liberty, or property, without due process of law) and the Fourteenth Amendment (prohibiting deprivation of life, liberty, or property,

without due process of law) of the United States Constitution and under article I, section 3 of the Washington Constitution (No person shall be deprived of life, liberty, or property, without due process of law).

The issue of the constitutionality of ELC 10.14(c) or similar bar disciplinary rules as applied in a plea bargain case appears to be a case of first impression both in this state and elsewhere. None of the prior cases identified by the WSBA at both the hearing and Board level deal with the constitutionality of ELC 10.14(c) or its predecessor rules in the context of a plea bargain. The WSBA searched out and found a variety of cases cited in its reply brief at the Board level in an attempt to show that the application of the conclusive presumption relied upon by the WSBA had been used in other cases but none of the cases cited by the WSBA in its reply brief dealt directly with the issue of the constitutionality of the application of a presumption of guilt in a bar case where there had been a plea bargain. Any discussions by the courts of the situation where a criminal plea bargain had occurred was in context of other issues; none of the cases cited by the WSBA dealt directly with the issues raised herein. Below signing counsel has found no such cases.

Smith is entitled to reasonable due process rights. United States Supreme Court case law has found that bar disciplinary proceedings are

"quasi-criminal." *In re Ruffalo*, 390 U.S. 544, 551, 88 S. Ct. 1222, 529, 20 L. Ed. 2d 117 (1968). Washington case law has established that bar proceedings are *sui generis* and are not criminal but that there are due process requirements in a bar disciplinary case. *In re Allper*, 94 Wn.2d 456, 617 P.2d 982 (1980). In that case the court rejected the contention that all criminal due process rights attached to these "special proceedings" but did recognize that due process is required.

In a medical disciplinary case the Washington court held in *Nguyen v. Department of Health*, 144 Wn.2d 516, 523, 29 P.3d 689 (2001) that:

> At its heart this case concerns the process due an accused physician by the state before it may deprive him his interest in property and liberty represented by his professional license. "Procedural dues process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment" [Citation omitted.] A medical license is a constitutionally protected interest which must be afforded due process. [Citations omitted.]

The issue presented was what is the standard of proof in a medical disciplinary case. The court, at pages 529 and 529, found that this medical disciplinary proceeding was

> "[Q]uasi-criminal" in exactly the same sense the United States Supreme Court used the term when it characterized disbarment proceedings "quasi-criminal." *In re Ruffalo*, 390 U.S. 544, 551, 88b S. Ct. 1222, 529, 20 L. Ed. 2d 117

(1968). If disbarment is quasi-criminal, so must be medical de-licensure.

The issue of ELC 10.14(c) is also a proof issue, as in *Nguyen*, since the rules permits the Bar to meet its standard of proof based only on the conviction.

While not all criminal due process rights attach to a bar proceedings; heightened due process rights do attach because of the constitutionally protected right which is at stake. An attorney has a due process right to be notified of clear and specific charges and to be afforded an opportunity to anticipate, prepare, and present a defense. *In re Disciplinary Proceeding Against Romero*, 152 Wn.2d 124, 136-37, 94 P.3d 939 (2004) [Emphasis added]. The effect of ELC 10.14(c) in a plea bargain case is to strip the attorney of the opportunity to present a defense because it creates a conclusive and irrefutable presumption of the guilt of the attorney of the criminal charges, leaves no room for any exceptions of any type and denies the attorney any opportunity to have the court engage in an independent determination of the alleged ethical violations. As a result it denies the attorney the opportunity to present a defense. Even if such a rule might apply when the lawyer has fully litigated the criminal case it cannot fairly apply in a plea bargain situation.

Any such an unrelenting rule relies upon the Bar's absolute certainty that there are no circumstances in which a lawyer might be innocent and still pled guilty. The rule as applied in this case denied Smith the opportunity to explain what happened from his point of view and denied him the opportunity to explain why he felt he had been coerced into the plea bargain. Smith's counsel indicated that Smith wanted to recant his plea bargain and to take his chances with how that would be interpreted by the hearing officer so he, Smith, could explain what had happened from his point of view.[1] That is not to be allowed according to the Bar Association since it would be inconvenient for it to have to actually prove its case as it has to do in all the cases it proves where there is no criminal conviction.

It is the absolute rigidity of the rule as applied in a quasi-criminal proceeding with heightened due process rights which makes the rule unconstitutional. For example, the Bar says it makes no difference if a lawyer could show that he was black or gay and his guilty plea was

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[1] What about the fact that he admitted guilt under oath, doesn't that mean the lawyer committed perjury?" There are defenses to perjury and besides "understandable perjury" might result in a lesser sanction than for the crime for which the lawyer stands convicted but which he never committed. These are issues to be sorted out at a hearing but do not control whether the lawyer should be given the chance to show he/she did not commit the crime or to show that he/she now recanted the statements in the plea agreement. Such recanting might or might not be given any weight by the hearing officer but under the rules as applied in this case, the WSBA says that the facts and circumstances of the plea are irrelevant even if the lawyer could prove he/she was illegally coerced into the plea bargain.

obtained under duress in a small rural county populated by bigots including the police. We cannot pretend that such things have not happened in this country. Suppose further that he could show that he received severe beatings until he agreed to a felony plea bargain and was then intimated by threats to renew the beatings if he said anything before the court when the plea was taken. As far as the record would show, he would have agreed to the plea bargain and the agreement would show that it was voluntary. Under the Bar's and Board's theory none of this would make any difference. There would be a conviction as a matter of record and the lawyer would not be allowed to go behind the facts of the conviction and explain what happened or to even tell his/her side of the story.

The lawyer's valuable and protected property right, his/her license to practice law, would be taken away by the state government without an opportunity to explain the plea agreement or to put on additional facts about why the plea agreement was in fact not the truth. Under the rules as applied in this case, a lawyer could be coerced into pleading guilty by any number of methods and yet it is the Bar's position adopted by the Hearing Officer and the Board that they are indifferent and do not care about any of that since it is administratively easier to simply find the lawyer guilty of misconduct than to deal with a possible defense by the lawyer.

None of this means that the WSBA could not use the plea bargain and the admissions made therein as evidence and as the admissions of the lawyer in the bar case. In most cases that would effectively end any challenge but the rule as applied in Smith's case creates an absolute barrier and prohibits even the opportunity to explain a respondent lawyer's version of what happened. Here Smith was denied the right to explain his version of the story or to even discuss why he pled guilty in the first place.

The due process difficulty is because ELC 10.14(c) seeks to establish a conclusive presumption for use in a Bar proceeding.

> A conclusive presumption requires the trier of fact to find the existence of an elemental fact upon proof of a basic fact. [Citation to law review deleted]. A conclusive presumption cannot be used against a defendant in a criminal trial. *See Morissette v. United States*, 342 U.S. 246, 275, 96 L. Ed. 288, 72 S. Ct. 240 (1952).

*State v. Brayman*, 110 Wn.2d 183, 189, 751 P.2d 294 (1988). ELC 10.14(c) requires the hearing officer to conclusively find that Smith was guilty of the crime and violated the statute if the WSBA shows the basic fact that Smith was convicted. This denies Smith due process because it relieves the WSBA of its obligation to prove all the elements of the crime charged.

> Mandatory presumptions potentially create due process problems. Indeed, they run afoul of a defendant's due process rights if they serve to relieve the State of its

> obligation to prove all of the elements of the crime charged. *Sandstrom v. Montana*, 442 U.S. 510, 523-24, 99 S. CT. 2450, 61 L. Ed. 2d 39 (1979).

*State v. Deal*, 128 Wn.2d 693, 699, 911 P.2d 996 (1996).

The WSBA's position is that only guilty people plead guilty and the lawyer had a chance to go to trial and having given that up by way of a plea agreement, he/she must take all consequences which flow including losing the right to make the WSBA prove its case by actual evidence, not by the use of a rule of convenience. The Bar says that if some sort of wrongful conviction occurred, a judge or an appeal will cure it, therefore we can accept that if someone pleads guilty and it is not reversed on appeal, they are in fact guilty.

Explain that to the convicted Wenatchee sex case defendants who would still be "guilty" but for the infusion of massive amounts of free legal assistance. Explain that to the convicted murder defendants who have been executed only later to have been found to have been innocent because of DNA evidence. They had appeals but to no avail. Explain that to persons such as Alaska Senator Ted Stevens who was convicted when the government lawyers cheated.

The fact of the matter is innocent persons are convicted. This gives the government enormous leverage in a plea situation. Smith was charged

with other defendants who undeniably did some bad acts and he faced being tried with them. A jury, not likely to be big fans of lawyers anyway, might find the lawyer guilty essentially for being a fellow traveler. Not the perfect idea of American justice? No, but it is the reality of what criminal defendants face.

When given the choice of risking a very long prison term based on a wrongful conviction, convictions which can and do happen, or taking a plea to a lesser violation and a much shorter sentence, it is no surprise that defendants are coerced into pleading guilty even when they are innocent. That is the real world not the hoped for one in which only guilty persons plead guilty.

The conclusive presumption of guilty which comes from simply showing that the lawyer pled guilty relieves the Bar of its obligation to prove the elements of its case since all it has to show is the plea bargain and it is deemed to have conclusively proved its case. The Bar is relieved of its obligation to prove all the elements of the ethics violation charged. The impact is to deny the lawyer any opportunity, no matter how outrageous or unfair the conviction maybe, to challenge the plea bargain and to explain his/her version of the facts.

This court, of course, has the authority to determine that one of its rules is unconstitutional. ELC 10.14(c), with its conclusive presumption which results in the loss of a protected right without a hearing, is a denial of due process since it denies the lawyer the right to put on a defense and to require the Association to prove the elements of its case. This court should determine that the rule is unconstitutional. As such the Bar has failed to prove its case since there is no evidence without its reliance on the improper rule and the case must be dismissed.

**Sanction Recommendation and Aggravators and Mitigators**

Smith challenges the sanction recommendation of disbarment. He was denied the meaningful opportunity to put on his evidence about the underlying facts which lead to the findings of misconduct which in turn lead to the sanction recommendation. Disbarment is not appropriate and based on this record it is not possible to make a determination as to what, if anything, is appropriate. Accordingly, the only appropriate resolution is to dismiss. As it is Smith has been suspended since 2004 so it is hardly as though he has not been sanctioned already.

The aggravator of dishonest and selfish motive was not proved on this record. The hearing officer finds that Smith was motivated by financial gain and that was the reason for his participation in the conspiracy. This

theory of what may or may not have been the motive of Smith is not found in either the facts set forth in the Formal Complaint nor in the exhibits. The WSBA did not call Smith on the issue of sanctions and did not ask him what his motives were. The hearing officer nonetheless finds there was a selfish motive, without ever having heard any testimony from Smith, because the documents show that Smith earned an income during the relevant period. This is strictly circumstantial evidence which can only be used when the facts are such that "only one reasonable conclusion may be inferred" from them. *In re Discipline of Guarnero*, 152 Wn.2d 51, 61-62, 93 P.2d 166 (2004). The facts in this case do not allow only the conclusion that Smith had a dishonest of selfish motive simply because he earned a salary and got a portion of the loan funds.

The aggravator pattern of misconduct was not shown. Even if the events did happen, the entire process was a single conspiracy, not a pattern of conspiracies.

The aggravator of refusal to acknowledge the wrongful nature of the conduct seeks to punish Smith because he protests his innocence.

Smith is entitled to the mitigator of other penalties and sanctions. The idea that going to prison for the same misconduct is not a penalty or sanction is absurd. What has happened is the court has lost track of what

the point of mitigators are. Since attorney discipline is not for purposes of punishment the idea of mitigators is to see if the attorney has "gotten the message" some other way. If he or she has then the level of sanction necessary to achieve the purposes of attorney discipline may be less since he or she had gotten the message by an alternate means. The alternate means has happened in this case and Smith is entitled to the mitigator of other penalties and sanctions.

## Conclusion

Smith seeks dismissal of this matter. The Bar, the hearing officer and the Board substantially misused the procedural portions of the ELCs and Smith has been denied procedural due process. The only remedy in these circumstances is to dismiss the case.

Dated this 11th day of February 2010.

Kurt M Bulmer, WSBA 5559
Attorney for Respondent Smith

## OFFICE RECEPTIONIST, CLERK

**To:** Kurt Bulmer
**Cc:** Scott Busby
**Subject:** RE: In re Smith, Supreme Court No. 200,748-1

Rec. 2-11-10

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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**From:** Kurt Bulmer [mailto:kbulmer@comcast.net]
**Sent:** Thursday, February 11, 2010 2:54 AM
**To:** OFFICE RECEPTIONIST, CLERK
**Cc:** Scott Busby
**Subject:** In re Smith, Supreme Court No. 200,748-1

Attached please find the opening brief in this matter. Please advise if there is any problem in getting it opened.

I believe that this case may be set for review for possible dismissal today, 2/11/10, on the Clerk's calendar. I would appreciate it if you could advise him that the brief has now been filed.

I have also provided a copy of the brief and this message to Bar Counsel Scott Busby.

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